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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HELIODORO ARREOLA SILVA, Defendant and Appellant.	F074899 (Super. Ct. No. CRM036247A) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Audrey R. Chavez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

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As retribution for an alleged theft of marijuana from a marijuana growing operation, a group of men seized two victims, bound them, transported them to an orchard, murdered them there, placed their bodies inside a car, and incinerated them by setting fire to the car. Defendant Heliodoro Arreola Silva (Heliodoro)[1] was convicted of two counts of first degree murder (Pen. Code, § 189)[2] with multiple murder and kidnapping special circumstances (§ 190.2, subd. (a)(3), (a)(17)), and two counts of kidnapping (§ 207, subd. (a)) with true findings on enhancement allegations that a principal was armed with a firearm (§ 12022, subd. (a)(1)). He received two consecutive sentences of life without the possibility of parole for the murders and consecutive sentences of eight years and five years for the kidnappings, plus one year for each arming enhancement.[3]

Heliodoro now argues that there were several errors in the jury instructions and these require the convictions or the special circumstance findings to be reversed. He also contends that the kidnapping sentences should have been stayed pursuant to section 654. We disagree.

The parties agree that the trial court imposed a parole revocation restitution fine in error. We strike that fine and affirm the balance of the judgment.

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1 When multiple people with the same last name are referred to in this opinion, we will use first names to avoid confusion.

2 Subsequent statutory references are to the Penal Code unless otherwise noted.

3 All references in this opinion to felony murder, malice aforethought, and the natural and probable consequences doctrine are to the law as it stood before January 1, 2019, the date on which the legislation known as Senate Bill No. 1437 (Stats. 2018, ch. 1015) took effect. No argument that this legislation has any impact on this appeal has been made.

FACTS AND PROCEDURAL HISTORY

The district attorney filed an information charging Heliodoro with the offenses and allegations indicated above, plus enhancement allegations of personal firearm use (§ 12022.53, subd. (b)) on each kidnapping count.

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The more important portions of the evidence presented at trial are summarized below.

Accomplice Testimony

The prosecution's key witness at trial was Salvador Silva (Salvador), Heliodoro's nephew. Salvador had been a defendant in the case, charged with kidnapping and murder, but he entered into an agreement with the prosecution under which both murder charges and one kidnapping charge were dismissed, in exchange for his testimony at trial and his plea of guilty to the other kidnapping charge, with probation and no prison time.

Salvador testified that at the time of the killings, he lived in a house behind Heliodoro's house in Atwater. There was an enclosure on the property in which Heliodoro grew marijuana for sale. At Heliodoro's house, people frequently came and went, including R.G. and R.S., the murder victims. R.S. was the nephew of R.G. Other men Salvador saw at Heliodoro's house included Bernardo Rangel, Monico Peña, Peña's nephew, called Junior, and another nephew of Heliodoro named Gerardo Silva (Gerardo).

According to Salvador, there was another marijuana grow at a separate location operated by Gerardo, Peña, Rangel, R.S. and R.G. Heliodoro and R.S. maintained a third grow.

Around the beginning of October 2014, Gerardo arrived at Salvador's house and said someone was doing something among the marijuana plants. Gerardo thought it was the police and ran away. A few days later, Peña and Gerardo looked inside the enclosure and plants were missing.

Later Gerardo, laughing, showed Salvador a picture or video taken with a cell phone, depicting two men being held in Heliodoro's house with their faces covered. Salvador did not think the two men were R.G. and R.S. One of them was tied up in a chair and the other was kneeling as someone poured water on him. Someone told Salvador the man had been told the water was acid, and he was screaming. Commenting on the same picture or video, Heliodoro said he tried to frighten the men by running a weed eater within their hearing and telling them it was a chain saw. He was trying to find out who stole the marijuana.

About a week before the killings, Heliodoro told Salvador he suspected R.G. and R.S. of being the thieves. He was going to ask them about the missing drugs. Subsequently, Heliodoro and Gerardo demanded a pound of marijuana from R.G. and R.S. Around this time, Heliodoro rented a second house, in Winton, and began living there.

On the evening of Saturday, October 18, 2014, according to Salvador's testimony, he came home to the Atwater property after work, and Heliodoro was there. Heliodoro asked him to go out with him to buy beer. After they bought the beer, Heliodoro drove to another store and told Salvador to go in and buy duct tape. Heliodoro said R.G. and R.S. were being held at Heliodoro's house at the Atwater property and they were going to be killed for stealing the marijuana. Heliodoro said he had deceived them to get them to come to the house by saying they should come get a gun he had been holding for them. Salvador said Heliodoro was doing wrong, but Heliodoro had a gun in his lap and ordered Salvador to go in and buy the tape, and Salvador complied.

Back at the Atwater property, Rangel came out of Heliodoro's house with a gun in his hand. He said he had hit someone on the head with it who was resisting being tied up. Heliodoro told Salvador to take the tape inside.

Inside Heliodoro's Atwater house, Salvador gave the tape to Gerardo. He saw R.S. sitting with his hands and feet tied with rope. His face and head were bloody. R.G.

was not yet tied. Peña and Junior were there. Peña was armed with a two by four and Junior with a stake apparently taken from the ground outside. Someone said they were waiting for another person to bring money, after which R.S. and R.G. would be released. If the money was not brought, they would be killed.

Heliodoro and Rangel appeared to Salvador to be in charge. They held the guns and would give orders—not to let R.S. and R.G. loose unless the money was brought, for instance—and the others would obey. Heliodoro said everything would be done as he directed. Sometimes Heliodoro and Rangel went off to the side to have conversations apart from the others.

Salvador's wife called him and told him to come to dinner. Heliodoro told him to go eat and then come back. When he returned, Heliodoro and Rangel were not there. Gerardo, Peña, and Junior were in a room with R.S. and R.G. R.S. and R.G. were both tied to chairs now, with their hands and feet bound. They were crying. R.G. asked Salvador to help him get loose. Salvador said the others would kill him if he tried. Rangel then returned, again holding a gun, and told Salvador to wait in the kitchen and not call the police.

Later, according to Salvador's testimony, Heliodoro and the others all talked about whether they should put R.S. and R.G. in a sort of storage bin that had been built in a hole in the ground on the Atwater property, or take them to Heliodoro's house in Winton. Salvador was sent out to get the storage bin ready, but when he came back, the others were preparing to leave with the victims. Their heads had been wrapped in duct tape. Salvador was told not to call the police. He was not told where they were going. He heard nothing more of the matter that night.

The following evening, Sunday, October 19, 2014, around 8:00 p.m., Gerardo called Salvador and asked if he wanted some methamphetamine. A coworker had asked Salvador earlier to buy him $50 worth, so Salvador said yes. Heliodoro met Salvador at an agreed place in a field and sold him the drugs. Heliodoro then drove away quickly.

On Monday, October 20, 2014, Heliodoro called Salvador at his work and asked him to come see him. He gave Salvador directions to the house in Winton. Salvador went there in the evening. Heliodoro greeted him and they each had a line of methamphetamine. Gerardo was there. He and Heliodoro had guns at their waists.

Salvador asked what had happened to R.S. and R.G. Gerardo said the men were taken to a field and he, Gerardo, had shot R.S. to death. Heliodoro confirmed that Gerardo had killed R.S. by shooting; he said Peña had killed R.G. with a bat.

Heliodoro or Gerardo said the group had brought the victims to the Winton house after leaving the Atwater house late Saturday night or early Sunday morning. Heliodoro said the victims were tied up at the Winton house all day on Sunday. Gerardo said the group formed a plan to take the victims to the orchard and kill them there. They all agreed that Peña and Gerardo would do the killing.

Salvador testified that Heliodoro said the group left the Winton house in three cars between 9:00 p.m. and 10:00 p.m. on Sunday and drove to the orchard. According to Gerardo, Heliodoro led the way in the first car. Peña drove the second car with Gerardo and the victims. Junior drove the third car.

Heliodoro told Salvador that when the group reached the intended spot off the road in the orchard, he waited while Gerardo and Peña carried out the planned killings. Afterward, Heliodoro went to look at the bodies to confirm that they were dead. Then the group placed the bodies in one of the cars. Gerardo and Peña had come up with the idea of burning the bodies. Gerardo poured diesel fuel inside the car and Peña lit it with a lighter. Heliodoro said he and Gerardo then returned to the Atwater property and built a fire in the yard to burn Gerardo's bloody clothes.

On cross-examination, Salvador admitted that on October 22, 2014, when he was first interviewed by the police, he said he went to the orchard with the others and helped to kill R.S. and R.G. Salvador testified that this was a false confession the detectives induced by saying they already knew he was guilty, and by intimidating him with other

pressure tactics. Salvador conceded he had falsely denied he went into the store to buy the duct tape, before he was told there was surveillance video showing him doing it. He further admitted he told the police he rode to the orchard in the car with Gerardo, R.S. and R.G.; he saw Peña kill R.G. with the bat; he saw R.S. trying to run away and then heard gunshots; he helped place R.G.'s body in the car, and he saw the bodies soaked with fuel. Afterward, back at the Atwater property, he burned his clothes. Salvador made all these statements, he testified, but they were false. He never went to the orchard at all, and he told the police lies because they wanted to hear them.

Heliodoro's Statement to the Police

The jury heard portions of recorded police interrogations of Heliodoro that took place on October 20 and 23, 2014. He told detectives that on Friday, October 17, 2014, R.S. and R.G. came to his Atwater house, saying they wanted to retrieve a handgun and several pounds of marijuana they had left there some time before. Gerardo, Salvador, Peña, Junior, and Rangel were there. Heliodoro believed R.S. and R.G. were plotting to kill him and the others one by one because they wanted to increase their share of the marijuana business. He thought they intended to kill him that day, when they got the gun back. When Heliodoro gave R.S. the gun, R.S. immediately pointed it at him. Rangel and Gerardo fought R.S.; Gerardo took the gun from him. Gerardo and Rangel tied R.S.'s hands behind his back. R.G. did not fight and was not yet tied up. Heliodoro then went to the Winton house while the others stayed at the Atwater house with R.S. and R.G. overnight.

The next day, Saturday, according to Heliodoro's statement to the detectives, he and Salvador bought the duct tape and returned to the Atwater house. Someone taped the victims' mouths. At some point during the day, they all drove to the Winton house, where R.S. and R.G. were again detained overnight and remained on Sunday.

On Sunday night, Gerardo and Peña put R.S. and R.G. into a car. With Junior and Heliodoro, they drove to the orchard. Heliodoro drove alone in his own car. He brought a gun with him. R.S. and R.G. were tied up, but Heliodoro believed he was in danger from the others. He thought they also wanted to kill him so they could take over his business. Salvador did not go.

Heliodoro told the detectives he stayed in his car at the orchard. He did not see what happened. The others told him Gerardo shot R.S., Peña killed R.G. with a bat, and the bodies were burned with diesel fuel. They said they burned their clothes back at the Atwater property.

Cell Phone Evidence

An expert on cell phones testified for the prosecution about his conclusions regarding the location of Heliodoro's cell phone during a portion of the dates in question, based on an analysis of records identifying cell phone antennas that received signals from Heliodoro's phone. The records were consistent with the phone being in the vicinity of the Winton house before 8:43 p.m. on Sunday, October 19, 2014. At that time, a call was made from Heliodoro's phone to a number in Mexico. The call lasted about nine minutes. At some point during those nine minutes, the phone began traveling northward. It reached the vicinity of the crime scene in the orchard around 9:12 p.m. or 9:14 p.m. By about 10:20 p.m., the phone was moving southward again, back toward the vicinity of the Winton house. Some time after midnight on Monday, October 20, 2014, the phone moved from the area of the Winton house to that of the Atwater house, and remained in that area until around 3:00 a.m.

Heliodoro's Testimony

Heliodoro testified in his defense. His account of the events leading up to the deaths of the victims differed in some key respects from his statement to the police. Before R.S. pointed the gun at him, he had never had trouble with him, R.G., or anyone

else. Gerardo and Rangel struggled with R.S. for the gun, and Gerardo took it and tied R.S. up. Gerardo ordered Heliodoro to go buy duct tape. He confiscated Heliodoro's car keys and made him drive a different car. Gerardo said that if Heliodoro failed to return or called the police, Gerardo would kill Heliodoro's children. Heliodoro and Salvador drove to a store to get the tape, and when they returned Salvador went inside with the tape. Heliodoro was scared and did not go back inside. He knocked on the door to get his car keys back and drove to the Winton house.

Later that night, Gerardo, Peña, and Junior arrived at the Winton house with the victims, Heliodoro testified. Gerardo ordered Heliodoro to allow him to bring the victims inside. They were tied and had tape over their eyes. Peña and Junior left and Gerardo, Heliodoro, and the victims spent the night in the house.

In the morning, according to Heliodoro's testimony, he got up and told Gerardo he was going to work. Gerardo told him he had to return afterwards. Heliodoro went to see the victims, who were still tied up, lying on a mattress. They asked him for water. Heliodoro gave them some water as Gerardo stood nearby with a gun in his hand.

When Heliodoro returned that night, Gerardo told him he had to drive to the orchard in his car and he would be in front of the others. Gerardo and Peña were in the second car with the victims and Junior was alone in the third car. Gerardo told Heliodoro to watch for Gerardo's turn signals so he would know how to get to their destination. He told Heliodoro they would be leaving the victims stranded in the orchard. He never said they were going to be killed.

When the cars arrived at the orchard, Gerardo drove in with Peña and the victims. Heliodoro drove only a short distance in and Junior parked outside. Heliodoro stayed in his car with the windows up and did not see or hear what was happening. He never saw the fire. Gerardo returned on foot and Heliodoro drove away with him. Gerardo said R.G. and R.S. had been killed. Back at the house, Gerardo again warned Heliodoro not to go to the police. Heliodoro testified that he still believed he and his family were in

danger. While he was being held in jail before trial, Salvador was his cell mate, and told him that if he was released, he would be killed.

On cross-examination, Heliodoro testified that R.G. and R.S. never took any marijuana from him. He believed they stole some marijuana from Gerardo and Peña because Gerardo and Peña refused to give them their share. Heliodoro had also heard, however, that R.G. and R.S. owed money to Gerardo, Peña, and Rangel.

Crime Scene Evidence

The bodies of R.G. and R.S., mostly consumed by fire, were found on October 20, 2014, in a burned-out car in the orchard. They were identified through the use of dental records and DNA analysis. R.S. died from gunshot wounds to the head. R.G. died from blunt force trauma to the head. Also, his larynx had been cut by a sharp implement.

Among items recovered from the scene was a bloody baseball bat bearing one fingerprint of Peña's. Also found at the scene were spent casings from shells determined to have been fired from a .45-caliber semiautomatic handgun discovered under a mattress at the Winton house.

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The jury returned verdicts, and the court imposed sentence, as indicated above. The personal firearm use enhancements on the kidnapping counts were found not true.

DISCUSSION

I. Jury Instructions

Heliodoro maintains there were several prejudicial errors in the instructions the trial court gave the jury.

A. Standards

In a criminal trial, the court must on its own motion instruct the jury on the general principles of law governing the case. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) The court must give an instruction requested by a party if the instruction correctly

states the law and relates to a material question upon which there is evidence substantial enough to merit consideration by the jury. (*People v. Avena* (1996) 13 Cal.4th 394, 424; *People v. Wickersham* (1982) 32 Cal.3d 307, 324, overruled on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 201.)

When assessing jury instructions for correctness or error and for harmlessness or prejudice, we do so in the context of the court's charge to the jury as a whole, not only isolated portions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) The court has no duty to give an instruction if it is repetitious of another instruction the court gives. (*People v. Turner* (1994) 8 Cal.4th 137, 203, overruled on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

Heliodoro did not object to the instructions at trial or request different instructions. To the extent the instructions at issue stated the law incorrectly, or were required to be given on the court's own motion but omitted, no request or objection was necessary to preserve an issue for appellate review. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Further, an appellate court can address an instructional error to which no objection was made at trial if the error impaired the defendant's substantial rights. (§ 1259.) And in any event, we always retain discretion to address issues despite their failure to be preserved. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.)

Generally speaking, asserted instructional errors present questions of law, which we review under the de novo standard. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 358; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

If the court's instructions contain an error of state law, reversal is warranted only if there is a reasonable probability that the defendant would have obtained a more favorable outcome absent the error. (*People v. Breverman* (1998) 19 Cal.4th 142, 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.) For federal constitutional error, we generally must reverse unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. Homicide Instructions Given in this Case

Using CALCRIM pattern instructions, the trial court gave the jury lengthy and complex instructions on murder. The instructions began by explaining that a person could be guilty of a crime as a direct perpetrator or as an aider and abettor. (CALCRIM No. 400.) They set forth the elements of aiding and abetting crimes in general. (CALCRIM No. 401.)

The instructions next explained that if Heliodoro was guilty of kidnapping, he would also be guilty of murder if an accomplice to the kidnapping committed murder during the kidnapping, provided that the murder was a natural and probable consequence of the kidnapping. (CALCRIM No. 402.) Heliodoro also could be guilty of murder as a member of a conspiracy to murder, or as a member of a conspiracy to kidnap where a member of that conspiracy committed murder to further the conspiracy and murder was a natural and probable consequence of the conspiracy to kidnap. (CALCRIM Nos. 416, 417.)

The instructions then defined murder as an act committed by the defendant, with malice aforethought, causing death. (This was, perhaps, somewhat confusing in light of the immediately preceding instructions involving murder under the natural and probable consequences doctrine, which did not require proof of malice aforethought on Heliodoro's part.) They defined implied malice and express malice, and stated that if the jury found Heliodoro guilty of murder, it would be murder in the second degree, unless it was proved to be murder in the first degree as defined in the next instruction. (CALCRIM No. 520.) The only theory of first degree murder stated in the next instruction was willful, deliberate, and premeditated murder. (CALCRIM No. 521.)

The instructions went on to set out the theory of first degree felony murder. (This was, perhaps, again somewhat confusing, for two reasons. First, it came immediately after instructions stating that murder is second degree murder unless shown to be first degree murder, and first degree murder is defined as premeditated murder. Second, it

referred at some points simply to felony murder and at other points to first degree murder under the theory of felony murder, without clarifying that felony murder based on kidnapping is always first degree murder, regardless of malice, intent to kill and premeditation.) The instructions stated that Heliodoro was guilty under this theory if he intentionally committed, aided and abetted, or joined a conspiracy to commit kidnapping; the kidnapping was personally committed by Heliodoro or personally committed by a perpetrator whom Heliodoro aided and abetted or with whom he conspired; and Heliodoro or the other perpetrator caused the victim's death while committing the kidnapping. (CALCRIM No. 540B.)

The instructions next stated as follows, in accordance with CALCRIM No. 548:

> "The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder.
>
> "Each theory of murder has different requirements, and I have instructed you on both.
>
> "You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory."

This instruction overlooked the fact that murder based on the natural and probable consequences doctrine does not require malice aforethought on the part of the defendant and is not felony murder. It also failed to mention that the jurors were *not* permitted to return a verdict where unanimous agreement on the theory was lacking if a theory accepted by some jurors supported a finding of first degree murder and a theory accepted by others supported a finding of second degree murder.

Finally, the instructions addressed the multiple murder special circumstance and the kidnapping special circumstance. On the multiple murder special circumstance, the court gave two CALCRIM instructions, one of which was correct for that special circumstance, and one of which was not.

The correct instruction was in accordance with CALCRIM No. 721, and stated that the prosecution was required to prove that Heliodoro was guilty in this case of at least one count of first degree murder plus at least one additional count of first or second degree murder.

But this instruction alone was insufficient for the multiple murder special circumstance in this case, because there are additional elements in cases in which the defendant is not the actual killer (§ 190.2, subds. (c), (d)). The pattern instruction designed to state these elements for all the special circumstances *except for* the felony murder special circumstances (i.e., those in which the murder was committed in the course of one of the enumerated felonies) is CALCRIM No. 702. With the blanks suitably filled in, that instruction would have stated that if Heliodoro was guilty of first degree murder but was not the actual killer, then the multiple murder special circumstance was true only if the prosecution proved Heliodoro acted with the intent to kill.

Instead, the court erroneously gave an instruction in accordance with CALCRIM No. 703 for the multiple murder special circumstance. That instruction is instead meant to be used for the *felony murder* special circumstances in cases where the defendant is not the actual killer. The pattern instruction states that if the defendant is guilty of first degree murder but is not the actual killer, then a felony murder special circumstance is true only if the prosecution proves the defendant *either* acted with the intent to kill *or* began participating in "the crime"—meaning the predicate felony—before or during the killing, was a major participant in that crime, and acted with reckless indifference to human life when participating in it. The reason why this instruction is different from CALCRIM No. 702 is that, by statute, for the felony murder special circumstances only, being a major participant in and acting with reckless indifference during the predicate felony can substitute for the intent to kill. (§ 190.2, subd. (d).)

The court's use of the wrong pattern instruction on this point had two consequences. One was that it misstated the mental state requirement for the multiple murder special circumstance by giving the jury an alternative to the intent to kill. The other was that the instruction was garbled because no predicate felony is involved in the multiple murder special circumstance. The references to "the crime" thus appeared to refer to the killing, resulting in nonsense (the defendant's participation in the killing began before or during the killing, etc.).

For the felony murder (kidnapping) special circumstance, the court gave one instruction, CALCRIM No. 731. That instruction, which is designed to be used without CALCRIM No. 703 and covers the kidnapping and arson felony murder special circumstances only, applies when the prosecution's theory includes an intent to kill on the part of the defendant. The instruction was created because of section 190.2, subdivision (a)(17)(M). That statute provides that, for the kidnapping and arson felony murder special circumstances, where the defendant intended to kill, "it is only required that there be proof of the elements of those felonies," and when the elements are proven, "those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder." (§ 190.2, subd. (a)(17)(M).) This provision was added to section 190.2 for the purpose of making an exception, in kidnapping and arson cases where the defendant intended to kill, to the judicially created requirement that the predicate felony and the killing must have independent purposes for a felony murder special circumstance to be true. (Stats. 1998, ch. 629, § 2.)

As given in this case, CALCRIM No. 731 stated that to prove the kidnapping special circumstance, the prosecution had to establish that the defendant intentionally committed, aided and abetted, or was a member of a conspiracy to commit kidnapping; that the defendant did an act that was a substantial factor in causing the death; and that the defendant intended the victim to be killed.

There were two choices the trial court should have made differently when implementing this instruction. It should have included an optional element stating that if the defendant did not personally commit the kidnapping, then another perpetrator, whom the defendant aided and abetted or with whom the defendant conspired, did so. And it should have filled in a blank so that the instruction would state that the defendant *or the other perpetrator* must have done an act that was a substantial factor in causing the death. (See CALCRIM No. 731.) These two choices would have made the instruction consistent with the other instructions, and would have been consistent with the prosecution's theory that Heliodoro was not the direct perpetrator of the killings and might not have been a direct perpetrator of the kidnappings.

The possible theories of murder presented to the jury by these jury instructions may be summarized as follows:

1. Murder Theories Not Referencing Kidnapping

- direct perpetrator or direct aider and abettor of murder/implied malice (second degree)*
- direct perpetrator or direct aider and abettor of murder/express malice (second degree)*
- direct perpetrator or direct aider and abettor of murder/express malice/premeditated (first degree)*
- member of conspiracy to murder (first degree)**

* The prosecutor conceded in his closing argument that Heliodoro was not a direct perpetrator of the murders.

** "[A]ll conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberate first degree murder" because conspiracy necessarily involves premeditation; consequently, "all murder conspiracies are punishable in the same manner as murder in the first degree." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1237-1238 (*Cortez*).)

2. Theories of Murder Via Kidnapping

- direct perpetrator or aider and abettor of kidnapping, plus murder by accomplice as natural and probable consequence of kidnapping (second degree under *People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*) [no first degree murder based on natural and probable consequences of other crime])

- conspiracy to kidnap, plus murder furthering conspiracy by member of conspiracy as natural and probable consequence of conspiracy to kidnap (second degree under *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 418 (*Vega-Robles*) [applying *Chiu* to natural and probable consequences of conspiracy])

- felony murder based on kidnapping (first degree)

- felony murder based on kidnapping (first degree) plus kidnapping special circumstance and/or multiple murder special circumstance

The discussion that follows includes our analysis of the errors mentioned above, to the extent they are claimed to be prejudicial in this appeal.

C. Instruction on Unanimity

The trial court used CALCRIM No. 548 to inform the jurors that to return convictions on each murder count, each of them had to conclude Heliodoro committed murder under one of the theories presented, but they need not agree on which theory. Heliodoro argues that, in a case in which theories of both first degree and second degree murder are made available to the jury, it is error to give this instruction.

Heliodoro is correct. In a prosecution for first degree murder, where the jury is presented with multiple theories of first degree murder, and none of second degree murder, the jury can properly return a verdict of first degree murder without unanimous agreement on the theory. This is a settled proposition and is the basis of CALCRIM No. 548. (*People v. Moore* (2011) 51 Cal.4th 386, 413; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Guerra* (1985) 40 Cal.3d 377, 386.) On the other hand, if the jury is instructed on theories that could lead to different degrees of murder, then it is error to

instruct the jurors that they need not agree on a theory. (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025; *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1278-1281 (*Johnson*).) This is because a verdict of guilty on a murder charge must include a unanimous decision on the degree of murder. (*People v. Jones* (2014) 230 Cal.App.4th 373, 376.) It does not help that the jury was separately instructed, in accordance with CALCRIM Nos. 520 and 521, that they had to decide on the degree of murder. CALCRIM No. 548 implied they could do so nonunanimously. (*Johnson*, *supra*, 243 Cal.App.4th at pp. 1280-1281.)

The People maintain that CALCRIM No. 548 was correct in this case because "the jury was given theories of murder that all led to first degree murder." This is not the case. The People do not explain why the jury could not have found Heliodoro guilty of second degree murder as a direct aider and abettor of murder with malice aforethought but without premeditation. For instance, the jury could have found that when Heliodoro led the other cars to the orchard, he assisted the killers with conscious indifference to the danger to the victim's lives, but did not intend that they be killed. The jury also could have found Heliodoro guilty of second degree murder by finding that the murder was a natural and probable consequence of committing or aiding and abetting kidnapping, or a natural and probable consequence of a conspiracy to kidnap. Heliodoro correctly points out that, under recent case law, a first degree murder verdict is error if based only on the theory that the murder was a natural and probable consequence of committing, aiding and abetting, or conspiring to commit another crime. Such a murder is second degree murder. (*Chiu, supra*, 59 Cal.4th at p. 166; *Vega-Robles*, *supra*, 9 Cal.App.5th at p. 418.)

The People contend that because the underlying crime is *kidnapping*, one of the enumerated felony murder felonies (§ 189, subd. (a)), the findings the jury might have made under the natural and probable consequences instructions would have established first degree felony murder, and indeed gone beyond those requirements. In felony murder, it is necessary to prove the defendant is guilty of the underlying felony and the

underlying felony led to the death; but for the natural and probable consequences theory, it must also be shown that a reasonable person would have known the outcome (murder) was likely. Therefore, the People say, a finding of murder under the natural and probable consequences doctrine in this case would be equivalent to a finding of first degree felony murder. This renders the *Chiu* issue moot, in the People's view, because *Chiu* expressly stated that its holding did not affect the viability of first degree felony murder. (*Chiu, supra*, 59 Cal.4th at p. 166.)

It is true that the natural and probable consequences theory requires proof that the murder was a natural and probable consequence of the underlying felony, and the felony murder theory does not. Beyond this, it is true that the natural and probable consequences theory requires proof that a coparticipant in the kidnapping *committed murder*, while the felony murder theory requires only that the defendant or another participant in the kidnapping *caused the victim's death*, even if only negligently, accidently, or unintentionally. (Compare CALCRIM No. 402 with CALCRIM No. 540B.)

Nevertheless, it is not true that a verdict of murder under the natural and probable consequences doctrine based on kidnapping would have included all the findings necessary for a verdict of first degree felony murder based on kidnapping. Unlike the instruction for murder under the natural and probable consequences doctrine, the instruction for first degree felony murder required the jury to find Heliodoro "intended to commit, or intended to aid and abet the perpetrator in committing, or intended that one or more members of the conspiracy commit kidnapping." (Compare CALCRIM No. 402 with CALCRIM No. 540B.) The instruction included this element because first degree felony murder requires proof of the defendant's *specific intent* to commit the underlying felony. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 (*Gutierrez*); *People v. Coefield* (1951) 37 Cal.2d 865, 867 (*Coefield*).) Murder under the natural and probable consequences doctrine based on kidnapping, by contrast, just requires the commission of

kidnapping, which is not a specific intent crime. (*People v. Thornton* (1974) 11 Cal.3d 738, 765, overruled on other grounds by *People v. Flannel* (1979) 25 Cal.3d 668, 684.)

For these reasons, it was possible for jurors to reach a verdict of second degree murder. Giving CALCRIM No. 548 was error.

The People argue that any such error is harmless under the *Chapman* standard because, even if jurors *could* have reached a second degree murder verdict consistent with the instructions, " ' "other aspects of the verdict or evidence" ' " (*Johnson, supra*, 243 Cal.App.4th at p. 1281) show the jury *actually* made all the findings necessary for first degree felony murder. We agree. Under the instructions given in this case, the *felony murder special circumstance* findings returned by the jury based on kidnapping, along with the verdicts of guilty on the predicate kidnappings, contained within them findings of all elements of felony murder. (See, e.g., *People v. Jones* (2013) 57 Cal.4th 899, 966-967 [jury instructions on first degree premeditated murder were defective, but conviction of robbery plus true finding on robbery felony murder special circumstance showed jurors agreed on all elements necessary for verdict of first degree felony murder based on robbery].)

The rationale for relying on a jury's felony murder special circumstance findings to show that instructional errors on other aspects of the murder instructions are harmless is that "the elements of felony murder and the [felony murder] special circumstance coincide," so the jurors necessarily found all the elements of first degree felony murder. (*People v. Elliot* (2005) 37 Cal.4th 453, 476.) It is not invariably the case that they coincide, however, so we must be careful.

Generally speaking, a jury needs to find *more* elements for a felony murder special circumstance in addition to those required for felony murder. For all the felony murder special circumstances, for example, it must be proved that the defendant either was the actual killer, or participated in the underlying felony with an intent to kill, or was a major

participant in the underlying felony and acted with reckless disregard for life. (§ 190.2, subds. (c), (d).) Felony murder requires none of this.

If all the discrepancies worked this way—felony murder special circumstances require findings that felony murder does not, but not vice versa—the special circumstance finding would always encompass felony murder, and we would need to say no more.

It appears, however, that the situation might sometimes be reversed. Of significance here is the fact, mentioned above and reflected in CALCRIM No. 540B, that first degree felony murder requires proof of the defendant's specific intent to commit the underlying felony. (*Gutierrez, supra,* 28 Cal.4th at p. 1140; *Coefield, supra,* 37 Cal.2d at p. 867.) Yet the California Supreme Court has stated: "We have never held that 'specific intent' is required for the felony-murder *special circumstance*. We see no reason to do so now." (*People v. Davis* (1995) 10 Cal.4th 463, 519, italics added.) But a number of years later, the court declined an opportunity to reaffirm this position. In *People v. Prieto* (2003) 30 Cal.4th 226, 257-258, instead of holding that the kidnapping special circumstance instruction was not required to include a specific intent to commit kidnapping, the court avoided that question. It concluded that any error in omitting such an element was harmless in that instance because the evidence compelled the conclusion that defendant had a specific intent to commit kidnapping.

Given this state of things, it might, or might not, be the case that a charge of felony murder can have one element—specific intent to commit the predicate felony—that the corresponding felony murder special circumstance allegation lacks. This opens up the possibility that in some cases, a jury's true finding on a felony murder special circumstance allegation would fail to guarantee that the jury found all the elements of the corresponding felony murder charge were established.

But in this case, whether required or not, the trial court's instruction in accordance with CALCRIM No. 731 on the kidnapping felony murder special circumstance *did*

include a specific intent to commit kidnapping as an element, using the same words for that element as in the CALCRIM No. 540B instruction that the court gave on felony murder based on kidnapping. Nor was anything else that appeared in the felony murder instruction missing from the felony murder special circumstance instruction.

Under these circumstances, the jury necessarily found all the elements of first degree felony murder. The erroneous use of CALCRIM No. 548 gave rise to a danger that some jurors would accept one of the theories of first degree murder while others would be unwilling to go beyond the findings necessary for one of the theories of second degree murder. But the outcome, because it includes the kidnapping verdicts and the true findings on the kidnapping felony murder special circumstance, shows that this did not come to pass. There were 12 jurors who found everything that was necessary to establish first degree felony murder based on kidnapping. The error of instructing that unanimity was unnecessary thus was harmless beyond a reasonable doubt.

There is one final observation to be made on this issue. In the sections of his opening and reply briefs on CALCRIM No. 548, Heliodoro relies on *Chiu* not just for the proposition that a murder verdict dependent on the natural and probable consequences doctrine is always a second degree murder verdict (so that CALCRIM No. 548, meant to permit disagreement in the choice among first degree murder theories only, should not have been given), but also for the necessary corollary that a first degree murder verdict dependent on the natural and probable consequences doctrine is erroneous. The latter proposition is the basis of a claim of error that has nothing to do with CALCRIM No. 548 or unanimity: namely, that we must reverse because there is no way of determining beyond a reasonable doubt that the jury's first degree murder verdicts were not based on that impermissible theory.

Having explained that the jury's findings, including its findings on the kidnapping special circumstances, amount to a determination that Heliodoro is guilty of first degree felony murder, we can now reject this last argument as well. Even if the jury erroneously

thought the natural and probable consequences doctrine could be a viable way of arriving at a first degree murder verdict, its findings as a whole demonstrate beyond a reasonable doubt that it also found all the elements of first degree felony murder.[4]

D. Mental State of Direct Perpetrator Under Aiding and Abetting Theory

Heliodoro maintains that the trial court erred not giving instructions that (1) "[i]n order to find appellant guilty of murder on an aiding and abetting theory, the jury was required to find that the actual perpetrator had the specific intent to kill, or express malice"; and (equivalently) (2) "the direct perpetrator must have the specific intent to kill in order to find appellant guilty of murder on an aiding and abetting theory." Further, (3) the "jury was erroneously instructed on implied malice, because no theory of guilt of first degree murder could be based on the implied malice of either appellant or the actual perpetrator."

As a preliminary point, proposition (3) presupposes that the jury could not have reached a verdict of *second* degree murder based on the implied malice of Heliodoro or a perpetrator aided and abetted by him. We see no reason why not, and Heliodoro proposes no reason. For instance, the jury could have taken the view that although the actual killers intended to kill the victims, Heliodoro never heard this or was convinced

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[4] The verdict forms the jury used for the murder counts stated that Heliodoro was guilty of murder "with malice aforethought and in a willful, deliberate, and premeditated manner." This, of course, describes first degree premeditated murder, not first degree felony murder. The language on the forms cannot be relied upon, however, to show the theory the jury actually chose, for two reasons. First, these apparently were the only verdict forms the jury received for first degree murder. The appellate record contains several unused verdict forms, but none of these were for other theories of first degree murder. Second, as indicated above, the jury was instructed that it need not agree unanimously on a theory of murder. This was correct so far as it pertained to the choice among theories of first degree murder. Moreover, our analysis does not need to be supported by the verdict form the jury actually chose. Its point is that the kidnapping special circumstance findings, along with the kidnapping verdicts, necessarily imply that the jury found all the elements of first degree felony murder based on kidnapping.

they would not go through with it, and his assistance and encouragement were done only with a conscious disregard for life.

Even putting that preliminary point aside, instructions based on these contentions would have been incorrect. The effect of *People v. Beeman* (1984) 35 Cal.3d 547 (*Beeman*), the case relied on by Heliodoro, is only that *if* the direct perpetrator had a particular type of intent (such as express malice), *then* the aider and abettor had to have the same (or a more culpable) intent in order to be guilty of *a crime requiring that intent*, because the aider and abettor does not automatically become guilty of the same crime as the direct perpetrator by helping the direct perpetrator do the criminal act while merely *knowing* of the direct perpetrator's purpose, and having no particular purpose of his or her own. Contrary to Heliodoro's supposition, *Beeman* does not demand that a direct perpetrator and an aider and abettor have the same mens rea. It also does not demand that the direct perpetrator have a mens rea more culpable than that of the aider and abettor, or vice versa. Instead, each actor has the mens rea shown by the evidence and the crime of which each is guilty, if any, is determined accordingly.

Beeman was convicted of robbery as an aider and abettor after the direct perpetrators committed robbery in his absence but with his encouragement. The question on appeal was whether CALJIC No. 3.01, as it was at the time, correctly stated the elements of aiding and abetting. (*Beeman, supra*, 35 Cal.3d at pp. 550-551.) The Supreme Court held that the pattern instruction was inadequate, because it did not require "proof that an aider and abettor rendered aid with an intent or purpose of either committing, or of encouraging or facilitating commission of, the target offense." (*Id.* at p. 551.)

At the time of *Beeman*, CALJIC No. 3.01 only required proof that the defendant aided and abetted with knowledge of the direct perpetrator's purpose. It did not also require proof that the defendant himself or herself have a purpose of aiding in the accomplishment of that purpose. (*Beeman, supra*, 35 Cal.3d at pp. 554-555.) The

Supreme Court held that this was contrary to the law, and it reversed Beeman's conviction, accepting his argument that "the instruction given permitted the jury to convict him of the same offenses as the perpetrators without finding that he harbored either the same criminal intent as they, or the specific intent to assist them." (*Id.* at p. 555.) After examining competing authorities, the court concluded that the law requires "proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose of either committing, or of encouraging or facilitating commission of, the offense." (*Id.* at p. 560.) Further, "[w]hen the definition of the offense includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime [citation], the aider and abettor must share the specific intent of the perpetrator." (*Ibid.*) Beeman's defense was that although he knew of the direct perpetrators' intentions, and gave them information they needed to carry out those intentions, he wanted nothing to do with the robbery and did not intend that it should be carried out. The Supreme Court concluded that, under these circumstances, the conviction could not be upheld where the jury was not told it must find the defendant shared in the direct perpetrators' criminal intent. (*Id.* at pp. 562-563.)

Heliodoro's argument appears to suggest that the meaning of *Beeman* is that an aider and abettor's criminal intent must be coextensive with—no more and no less than—that of the direct perpetrator, and where it is otherwise, the aider and abettor is not just not guilty of the same offense as the direct perpetrator, but not guilty of any offense. This understanding of *Beeman* would explain why Heliodoro thinks the jury should have been told he could not be guilty as an aider and abettor of any type of murder requiring express malice unless the direct perpetrators had that mental state as well—and, more specifically, he cannot be guilty of first degree premeditated murder if the direct perpetrators' mens rea was only implied malice.

But there is no rule like the one Heliodoro attempts to extract from *Beeman*. If an aider and abettor of a criminal act has a greater or lesser mens rea than a direct

perpetrator of the same act, the aider and abettor can be guilty of a correspondingly greater or lesser offense.

Our Supreme Court affirmed this principle going in one direction—an aider and abettor can be guilty of a greater offense than a direct perpetrator on account of the aider and abettor's more culpable mental state—in *People v. McCoy* (2001) 25 Cal.4th 1111, 1118-1119 (*McCoy*):

> "As stated in another work by Professor Dressler, 'many commentators have concluded that there is no conceptual obstacle to convicting a secondary party of a more serious offense than is proved against the primary party. As they reason, once it is proved that "the principal has caused an *actus reus*, the liability of each of the secondary parties should be assessed according to his own *mens rea*." That is, although joint participants in a crime are tied to a "single and common *actus reus*," "the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt ... will necessarily be different as well." ' (Dressler, Understanding Criminal Law (2d ed. 1995) § 30.06[C], p. 450, fns. omitted.)
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> "Professor Dressler explained how this concept operates with homicide. 'An accomplice may be convicted of first-degree murder, even though the primary party is convicted of second-degree murder or of voluntary manslaughter. This outcome follows, for example, if the secondary party, premeditatedly, soberly and calmly, assists in a homicide, while the primary party kills unpremeditatedly, drunkenly, or in provocation. Likewise, it is possible for a primary party negligently to kill another (and, thus, be guilty of involuntary manslaughter), while the secondary party is guilty of murder, because he encouraged the primary actor's negligent conduct, with the intent that it result in the victim's death.' (Dressler, Understanding Criminal Law, supra, § 30.06[C], p. 450.)" (*McCoy, supra*, 25 Cal.4th at p. 1119.)

In *McCoy*, the court suggested that the principle also works in reverse: an aider and abettor with a lower level of mens rea than a direct perpetrator can be guilty of a correspondingly lesser offense, instead of being absolved of liability altogether: "The same principles should apply whenever a person aids, or perhaps induces, another to kill, whether that other person is entirely innocent … or less culpable, as possibly here, *or,*

potentially, more culpable. In any of these circumstances, each person's guilt would be based on the combined *actus reus* of the participants, but also solely on that person's own *mens rea*. Each person's level of guilt would ' "float free." ' (Dressler, Understanding Criminal Law, supra, § 30.06[C], p. 450.)" (*McCoy, supra*, 25 Cal.4th at p. 1121, italics added.)

Recently, our Supreme Court acknowledged the reverse direction in unequivocal terms: "Defendants correctly observe that … an actual killer and an aider/abettor are not always guilty of the same offense. Rather, [putting aside felony murder and aiding and abetting under the natural and probable consequences doctrine] the aider/abettor's guilt is based on the combined acts of all the principals and on the aider/abettor's own knowledge and intent. Consequently, in some circumstances an aider/abettor may be culpable for a greater or lesser crime than the actual killer." (*People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 917-918.)

In other words, to be guilty of a crime as serious as or more serious than a direct perpetrator's, an aider and abettor must have the same mental state as a direct perpetrator or a more culpable mental state. If a direct perpetrator had only implied malice and was guilty of second degree murder, an aider and abettor could be guilty of that offense or other offenses, depending on the aider and abettor's mental state. Thus the aider and abettor could be guilty of second degree murder by intentionally helping the direct perpetrator do the act that caused death, at the same time being consciously indifferent to that act's danger to human life. Or the aider and abettor could be guilty of second degree murder by intentionally helping the direct perpetrator do that act while intending the victim to be killed. Or the aider and abettor could be guilty of first degree murder by premeditating the killing of the victim, and then intentionally helping the direct perpetrator do the act and intending the victim to be killed by it, even though the direct perpetrator does not so intend. All these outcomes would be logically consistent with the

direct perpetrator having acted with implied malice only (or even mere negligence, as indicated in *McCoy*).

Conversely, if a direct perpetrator was guilty of first degree murder based on express malice and premeditation, an aider and abettor could be guilty of second degree murder if intending to help the direct perpetrator do the fatal act, and at same time being consciously indifferent to that act's danger to human life, or intending without premeditation that the direct perpetrator's act would kill the defendant.

The rule of *Beeman*, *McCoy*, and *Amezcua* is broken only if one party is found guilty of a crime equal to or greater than that of the other while having a mental state less culpable than the other's. The jury could not find, for instance, that where the direct perpetrator acted with an intent to kill and premeditation and was guilty of first degree premeditated murder, the aider and abettor also was guilty of first degree premeditated murder despite having only implied malice, or express malice but no premeditation.

For these reasons, Heliodoro is mistaken in his argument that the trial court erred by not instructing the jury that he could not be guilty of murder on a theory of direct aiding and abetting unless he and the direct perpetrators all intended to kill.

Finally, even if there were any such error, it would be harmless beyond a reasonable doubt. The jury's felony murder special circumstance finding established that Heliodoro was guilty of first degree felony murder, as explained above. The purported error in the instructions on murder by direct aiding and abetting would not have affected the outcome.

E. Instructions on Conspiracy and Implied Malice

The jury was instructed on conspiracy as a theory of murder: Heliodoro could be found guilty of murder if he was part of a conspiracy to murder and the killings were carried out by his coconspirators. The instructions the jury was given on murder included instructions that a murder conviction can be based on a finding of implied malice.

Heliodoro correctly points out that there is no such thing as a conspiracy to commit implied malice murder. If murder is the object of the conspiracy, the conspiracy necessarily involves an intent to kill and premeditation. (*Cortez, supra*, 18 Cal.4th at pp. 1237-1238.) Heliodoro contends that it was reversible error to give both the conspiracy instructions and the implied malice instructions because the jury could have used these to construct an incorrect theory of murder. We disagree.

It is true that a conspiracy *to commit murder*—regardless of whether it is charged as conspiracy (§ 182) or as murder (§ 187)—is necessarily a conspiracy to commit first degree premeditated murder. Nevertheless, contrary to Heliodoro's contention, instructions on implied malice murder and instructions on conspiracy can properly be used in combination as a basis for a conviction on a charge of murder. As noted above, a conspiracy *to kidnap*, plus murder furthering the conspiracy, by a member of the conspiracy, as a natural and probable consequence of the conspiracy to kidnap, is a basis for a conviction of second degree murder. (*Vega-Robles, supra*, 9 Cal.App.5th at p. 418.) The point in *Vega-Robles* was that, even if the direct perpetrator of the murder acted with intent to kill and premeditation in this situation, and even if that type of murder was a natural and probable consequence of the conspiracy, this would still be second degree murder under *Chiu, supra*, 59 Cal.4th at pages 158-159. But there is no reason why a verdict of second degree murder for a kidnapping conspirator could not be arrived at similarly where the direct perpetrator of the murder acted only with implied malice. Consequently, there is nothing inherently wrong, in a case in which murder is charged, with giving both implied malice instructions and conspiracy instructions. If a kidnapping conspiracy leads to an implied malice murder as a natural and probable consequence, the conspirators are guilty of that murder.

Nor do we see any danger of jury confusion under the particular circumstances of this case. The instructions explained that express malice is the intent to kill and implied malice involves conscious disregard for life but stops short of the intent to kill. They

explained that a murder committed not only with the intent to kill but also with willfulness, deliberation and premeditation, is first degree murder. And they explained that a conspiracy to commit murder involves the defendant's agreement to commit murder, and his intention at the time of the agreement that one or more conspirators would commit it.

Having heard these instructions, the jury did not need to be told expressly that if it found Heliodoro guilty of murder on a theory of conspiracy to murder, the murder in question would necessarily involve an intent to kill and premeditation on his part. The language of the conspiracy instruction operated to exclude a verdict of murder based on implied malice where the murder is the object of the conspiracy, because it stated that the jury must find the conspirators agreed in advance to commit murder. That agreement would not be consistent with an absence of an express, and indeed a considered, intent to kill on the part of the conspirators. At the same time, the instructions properly allowed the jury to reach a verdict of second degree murder by determining that Heliodoro conspired with the others to commit kidnapping, and that during the kidnapping his coconspirators committed the murders—which could have been implied malice murders—as a natural and probable consequence of the kidnappings.

Had the jury reached verdicts of first degree murder in a similar manner—viewing first degree murder as a natural and probable consequence of the conspiracy to kidnap—that would have been error, as discussed in section I.C. above; but as we have said, the error in the instructions of allowing that possibility was harmless.

Assuming, as we do, that jurors follow instructions, we conclude the jury could not erroneously return a verdict of murder based on a conspiracy to *murder* combined with implied malice. It could have returned a verdict of second degree murder based on a conspiracy to *kidnap* combined with a finding of killing with implied malice, using the natural and probable consequences doctrine, but that would have been permissible. (And, as discussed in part I.C. above, such a verdict would not automatically amount to first

degree felony murder.) Taking the court's charge to the jury as a whole, we conclude there was no danger of the kind of misunderstanding Heliodoro describes, and no error.

And once again, any deficiency in the instructions on other theories of murder was harmless because the jury's true findings on the felony murder special circumstance, and its verdicts of kidnapping, prove that it actually found all that needed to be found for verdicts of first degree felony murder, thus obviating the danger of improper verdicts based on erroneous instructions.

F. Instruction on the Multiple Murder Special Circumstance

Heliodoro points out, and the People concede, that the court used the wrong pattern instruction when instructing the jury on the multiple murder special circumstance. Specifically, the court used an instruction that wrongly allowed the jury to find the multiple murder special circumstance allegation true without finding that Heliodoro had an intent to kill. We agree with the People's view that this error was harmless because the jury found under another instruction (for the kidnapping special circumstance) that Heliodoro had an intent to kill.

Section 190.2, subdivisions (c) and (d), as we have mentioned, set forth extra requirements for special circumstance findings in cases in which the defendant is not the actual killer. Subdivision (c) requires a finding of intent to kill for all special circumstances, while subdivision (d) creates an exception to subdivision (c) for the felony murder special circumstances by allowing the intent to kill finding to be replaced by findings that the defendant was a major participant in the underlying felony and participated in it with reckless indifference to life. At the same time, however, section 190.2, subdivision (a)(17)(M), allows the judicially-created requirement of independent purpose to be dispensed with in the case of the kidnapping and arson special circumstances—but then there must be proof of intent to kill. In this case, the prosecution undertook to prove the kidnapping special circumstance under subdivision

(a)(17)(M), so the instructions on *both* the multiple murder special circumstance *and* the kidnapping special circumstance should have required proof of Heliodoro's intent to kill; and the major participant/reckless indifference alternative should not have been mentioned at all. But, as explained above, the court selected the wrong pattern instruction for the multiple murder special circumstance, which allowed the jury to find either that Heliodoro had the intent to kill or (incoherently) that he was a major participant in something unspecified, and participated in that thing with reckless indifference. For this reason, the jury's true finding on the multiple murder special circumstance instruction did not establish the intent to kill requirement for that special circumstance. But because the jury also returned a true finding on the kidnapping special circumstance, the instruction for which *did* require intent to kill as an element, the error in the multiple murder special circumstance was harmless beyond a reasonable doubt. There is no question but that the jury made the necessary finding.

Heliodoro suggests that the jury's finding of intent to kill pursuant to the instruction on the kidnapping special circumstance cannot be relied on because the prosecutor, in closing argument, made remarks that blurred the distinction between the requirements stated in the instruction for the multiple murder special circumstance and those stated in the instruction for the kidnapping special circumstance. These remarks, according to this suggestion, could have led the jury to the erroneous belief that it could find *both* special circumstances true based on a finding that Heliodoro was a major participant in an underlying felony and acted with reckless indifference to life—when in reality the intent to kill was required for both.

The prosecutor was not very precise in his oral description of the mental state elements of the special circumstances, just as the trial court and the person who prepared the jury instructions were imprecise in the written description for the multiple murder special circumstance. To be correct, both the jury instructions and the prosecutor's argument should have stated clearly that both special circumstances required proof of

intent to kill; and no reference to major participant/reckless indifference should have been made at all. But the prosecutor argued as follows:

> "Here's some general things about special circumstances. This applies to somebody who's not the actual killer, but who's guilty as [an] aider or abettor or member of a conspiracy, which is what you have here. There's very little evidence, in fact, no evidence that Mr. Silva was the actual killer of [the victims]. But there's powerful, powerful evidence that he was involved in this enterprise from the beginning and, in fact, a leader, someone in charge of this enterprise.
>
> "So in that instance in a case like this, we have to show the intent to kill, and that could be shown circumstantially from all the evidence and also through direct evidence. In fact, repeatedly over and over again his nephew Salvador Silva said that the plan was to kill these guys. That was what they were saying. And circumstantially, you look at everything. No question that was the plan when they went out to the orchard, given everything they had.
>
> "So either that[,] that he intended to kill—or here's your other option. Option two. Participation began before or during the killing, participation began. Well, probably—hard to say exactly, but 28, 29 hours before the actual killing. Defendant was a major participant in the crime. Yes. And to participate in the crime with reckless indifference to human life. You engage in kidnapping. You tie somebody up. You're involved in that. You are acting with reckless indifference driving out in the orchard like that.
>
> "So you first have to find that[,] and here the two—the specific special circumstances that are at issue in this case. And you'll see this on the—on the charging document and again the verdict form you get it will have a charge for first-degree murder. And then after that, it will say 'special circumstances.' Then you have to figure out—circle whether or not you think it was true or not true that this special circumstance was proven. This one. Convicted of more than one murder. That's pretty simple. You have to show there that they were two or more people killed in a case. And here, obviously, there's no dispute that both [victims] were killed.
>
> "The second special circumstance, which is charged, will be on your verdict forms as well. It will have the charge for first-degree murder. It will have a special circumstance one, true or not true. Special circumstance two—this one—true or not true. And you circle the one you think is

> appropriate. This one is intentional murder while engaged in a … kidnapping. Did an act on a substantial factor [sic] in causing the death, and intended the other person to be killed.
>
> "Don't confuse it with the felony murder rule. All the felony murder rule requires is the intent to aid and abet, conspire to commit a kidnapping. That's it. That makes you liable for first-degree murder. This is something else on top of that called 'special circumstance,' which requires the intent to kill and requires the defendant being a substantial factor as opposed to just merely aiding and abetting in some way."

In these remarks, the prosecutor appeared, at one point, to assert erroneously that intent to kill and major participant/reckless indifference were both options the jury could use in finding either special circumstance. At others, he indicated correctly that at least the kidnapping special circumstance elements could be satisfied by intent to kill only.

If we were persuaded that these equivocations meant there could be a reasonable doubt regarding whether the jury actually found Heliodoro intended to kill the victims, we would have to reverse both special circumstances. This in turn would mean the two sentences of life without parole would have to be reversed.

But the kidnapping special circumstance instruction was clear on the element of intent to kill, and the jury was directed to follow the court's instructions, and to disregard counsel's comments on the law if they were in conflict with the instructions. We assume, absent indications to the contrary, that a jury is capable of following the court's instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) As we have already indicated, the finding of intent to kill for the kidnapping special circumstance serves to resolve any uncertainty arising from the instructional error on the multiple murder special circumstance. The jury could not rationally find intent to kill as to one but not the other, since both applied to the same facts. Despite the mistake in the prosecutor's argument, we remain convinced that the instructional error on the multiple murder special circumstance was harmless beyond a reasonable doubt.

G. Instruction on Prior Uncharged Conduct

Salvador testified about the picture or video he saw on Gerardo's phone, taken 15 to 20 days before the charged offenses, of two people tied up. Gerardo told Salvador these men had been seized and brought to one of Heliodoro's houses, earlier in an effort to find and punish those who stole the marijuana. One of them was kneeling and had his eyes covered, and someone was pouring water on him. Gerardo said the man had been told the water was acid, and he was screaming in fear. Heliodoro told Salvador he was not involved in this activity, but also stated that he had turned on a weed eater within the men's hearing, so they would think he had a chain saw and be frightened into naming the thieves. This testimony was admitted into evidence for the purpose of showing motive and absence of mistake within the meaning of Evidence Code section 1101, subdivision (b).

The jury was instructed with CALCRIM No. 375 on the limited purposes for which this evidence could be used. The instruction included the statement that the jury could use the evidence if it found the People had proved the uncharged conduct by a preponderance of the evidence.

Heliodoro now argues that, by applying the preponderance standard to findings claimed to have relevance to his guilt or innocence (by showing he had not made a mistake about his accomplices' intentions, for instance) the use of this instruction improperly lowered the prosecution's burden of proof.

Our Supreme Court rejected the same argument in *People v. Carpenter* (1997) 15 Cal.4th 312, overruled on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1189, 1191. The high court held that application of the preponderance standard to proof of uncharged conduct relevant to the defendant's intent to commit the charged offenses was valid and did not lower the prosecution's burden of proof. (*Id.* at p. 382.)

Heliodoro cites *People v. Nicolas* (2017) 8 Cal.App.5th 1165, but it is not on point. The Court of Appeal held that it was error to admit, as prior bad act evidence

under Evidence Code section 1101, subdivision (b), evidence that the defendant had been texting and making phone calls while driving, just before the collision for which he was charged with vehicular manslaughter with gross negligence. This was evidence of the negligence itself, so the jury should not have been instructed to weigh it under the preponderance standard. (*Nicolas, supra*, at pp. 1178-1180.) Heliodoro tries to connect *Nicolas* to this case by describing the prior conduct evidence as "transactionally related" to the charged offenses, but this is unavailing. The fact that activity 15 to 20 days earlier also was motivated by a desire to find and punish marijuana thieves does not make that activity part of the same transaction as the current offenses.

Heliodoro next contends that the court erred because the instruction it gave said, "The People must still prove every charge and allegation beyond a reasonable doubt." He asserts that the "instruction was modified to delete the phrase 'each element' from" this sentence.

The current version of the pattern instruction does not include that phrase. (See CALCRIM No. 375.) Earlier versions did include it. (See, e.g., CALCRIM No. 375 (Fall 2006 ed.) at p. 119.) Apart from stating that the newer text "exacerbated the error," Heliodoro does not explain what difference it makes, and he cites no authority on the topic. We will not discuss it further. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 [unsupported points deemed forfeited]; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [same].)

The instruction given by the court stated that the uncharged conduct evidence was "not sufficient by itself to prove that the defendant is guilty of Kidnapping and/or Murder or that the enhancement allegations of Personal Use of a Firearm and Principal Armed with a Firearm have been proved." Heliodoro points out that the court here omitted a reference to the special circumstance allegations added to the murder charges. He says this omission "suggested" the uncharged conduct evidence *was* sufficient by itself to prove the special circumstances. We agree that the special circumstances ought to have

been mentioned, along with the other charged matters, assuming these matters needed to be listed at all in this instruction. But we are persuaded that the omission surely did not affect the verdict. Finding the kidnapping and multiple murder special circumstances—and nothing else—true based on the prior conduct evidence alone would have been wholly illogical in light of the court's entire charge to the jury. Speculation that the jury could have acted irrationally is no indication of prejudicial error.

Heliodoro states that the prior uncharged conduct evidence was insufficient as a matter of law to prove that a prior kidnapping took place, because it included nothing to support the asportation element of kidnapping. The men in the picture might have entered the house willingly and only been restrained against their will once inside. But Heliodoro cites no authority and provides no argument in support of the view that prior uncharged conduct evidence is admissible only if it is sufficient to prove that the prior conduct included all the elements of a specified criminal offense. In fact, Evidence Code section 1101, subdivision (b), refers to admission of evidence that "a person committed a crime, civil wrong, or other act." The prior tying up and tormenting of people suspected of stealing marijuana could be relevant to the present case, if proved by a preponderance of the evidence, even if did not amount to kidnapping. Heliodoro has identified no error on this point.

Finally, observing that Salvador was an accomplice to the *currently charged offenses*, Heliodoro claims that, under section 1111, his testimony on the *prior uncharged conduct* was inadmissible because there was no other evidence of that conduct. This is not correct. Section 1111 provides that uncorroborated accomplice testimony alone is insufficient to prove a crime. But prior uncharged conduct evidence can be admissible even if the conduct was not a crime, so Salvador's testimony about such conduct did not need to prove a crime. And there is no indication that Salvador was in any way involved in the uncharged conduct, so his testimony was not accomplice testimony with respect to that conduct. Section 1111 thus has no bearing on the admissibility of this evidence.

Heliodoro cites *People v. Bowley* (1963) 59 Cal.2d 855, but that case contains nothing to support his contention. It held that film footage showing the defendant committing the charged offenses would have been sufficient under section 1111 to corroborate an accomplice's testimony, but for the fact that the accomplice's testimony also was the foundation for the introduction of the footage into evidence. (*Bowley, supra,* at p. 863.)

II. Section 654

Heliodoro argues that the kidnapping sentences should have been stayed pursuant to section 654, subdivision (a). This statute provides that a defendant cannot receive multiple punishments for a single act, or for a course of conduct unified by a single criminal objective, even though that act or course of conduct is punishable in different ways by different provisions of law. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19, overruled on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 344.)

Heliodoro contends that section 654 applies because the kidnappings and murders were parts of a single course of conduct with one criminal objective. We review under the substantial-evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.)

The record contains sufficient evidence to support the conclusion that Heliodoro had separate criminal objectives for the kidnappings and the killings. The trial court could reasonably find that the kidnappings first had an objective of obtaining payment for the stolen marijuana as ransom for the kidnapped men. When that failed, a second objective came into play, that of executing the victims. The fact that felony murder does not require any intention at all with respect to the killings does not alter the analysis: Based on the evidence, the trial court could reasonably find (as the jury also found) that

Heliodoro intended to kill the victims, even assuming the jury applied the felony murder instructions in reaching its verdicts.

Heliodoro cites *People v. Ordonez* (1991) 226 Cal.App.3d 1207, but that case is readily distinguishable. The defendant kidnapped a victim for ransom and put him in the trunk of a car. While the defendant and his accomplices were trying to exact the ransom from the victim's wife, the victim died of suffocation. The defendant was convicted of murder and aggravated kidnapping. The Court of Appeal held that the shorter sentence had to be stayed under section 654 because the murder arose out of the kidnapping and had no objective of its own. (*Ordonez*, *supra*, at pp. 1239-1240.) The facts of this case are not similar. Here the kidnappings began as a scheme to force the payment of money; the culprits turned to the objective of killing the victims to punish them after the first objective failed. The kidnappings continued from that point and then shared with the murders the objective of killing for punishment, but the fact remains that one objective of the kidnappings—ransom—was not among the objectives of the killings.

Heliodoro also asserts that section 654 requires the kidnapping sentences to be stayed because each kidnapping was punished in three different ways under three different provisions of law: under the law prescribing punishment for kidnapping (§ 208), he received a determinate prison term for kidnapping; under the first degree murder statute (§ 189, subd. (a)), the kidnapping elevated the murder to the first degree (assuming the jury relied on the felony murder theory), which would result in a minimum indeterminate sentence of 25 years to life (§ 190, subd. (a)); and under the special circumstances statute for first degree murder, he received a sentence of life without parole (§ 190.2).

This theory—that whenever one of the felonies enumerated in section 189 is the basis of a first degree felony murder verdict, or of that verdict plus the imposition of a sentence of life without parole based on a felony murder special circumstance, punishment for the underlying felony is barred by section 654—is unsupported by

authority, as far as we know. Heliodoro raises if for the first time in his reply brief, cites no authority for it, and produces no reasoning in support of it. We deem the issue forfeited.

III. Full Consecutive Sentences for Kidnapping

Heliodoro asserts that the trial court was not permitted to impose full consecutive sentences on the kidnapping counts, as opposed to concurrent sentences or one full sentence plus a consecutive sentence equal to one-third of the middle term under section 1170.1, subdivision (a). This is not correct.

Section 1170.1, subdivision (b), addresses the imposition of fully consecutive sentences for the kidnapping convictions. It reads: "If a person is convicted of two or more violations of kidnapping, as defined in Section 207, involving separate victims, the subordinate term for each consecutive offense of kidnapping shall consist of the full middle term and shall include the full term imposed for specific enhancements applicable to those subordinate offenses." The court applied this provision correctly, imposing the upper term of eight years for one kidnapping count plus a full consecutive middle term of five years for the other.

Heliodoro next argues that the decision to impose fully consecutive sentences must have been based on the court's finding of an aggravating circumstance, tying or binding under section 1170.84. He argues that because this decision was based on judicial fact-finding (tying and binding not being required for any of the jury's verdicts), it violated his right to a jury trial and proof beyond a reasonable doubt under *Apprendi v. New Jersey* (2000) 530 U.S. 466.

This argument is wrong for multiple reasons. First, section 1170.1, subdivision (b), authorizes full consecutive sentences whenever there are convictions on multiple kidnapping counts with multiple victims. There is no reason to assume the court relied on tying and binding or section 1170.84. Assuming the trial court was required to have a

reason independent of section 1170.1, subdivision (b), for imposing consecutive sentences of any sort (as opposed to full consecutive sentences specifically) in the first place, nothing in the record suggests it failed to do so.

Second, section 1170.84 does not address consecutive sentences. It provides that tying, binding, or confining a victim of certain offenses shall be considered aggravating circumstances when the court is considering whether to impose the lower, middle or upper term for a determinate sentence. (§§ 1170, subd. (b); 1170.1; 1170.84.)

Third, section 1170.84 does not contravene *Apprendi*. Under *Apprendi*, a sentence violates a defendant's unwaived right to a jury trial where, under the sentencing law in question, a judicially-found fact was a necessary precondition to the imposition of that sentence, unless that fact was the fact of a prior conviction. (*Cunningham v. California* (2007) 549 U.S. 270, 274 (*Cunningham*).) Section 1170.84 requires a trial court choosing a sentence from a sentence triad to regard tying, binding, or confining as an aggravating circumstance. But section 1170, subdivision (b), does not require a finding of an aggravating circumstance, or any other factual finding, as a precondition of the imposition of any term. Instead, "the choice of the appropriate term shall rest within the sound discretion of the [trial] court." (§ 1170, subd. (b).) So, in a case in which the evidence proved that tying, binding or confining took place, the sentencing court would be obliged to view those facts as an aggravating circumstance. But this would not alter the scope of its sentencing discretion. It could impose the upper term without such facts, and it could decline to impose it with them.

The Legislature's commitment of the choice among the three terms to the trial court's sound discretion happened in 2007, after the United States Supreme Court ruled that California's determinate sentencing law was unconstitutional under *Apprendi* because judicial factfinding about aggravating and mitigating circumstances had been a necessary precondition to the imposition of the upper term under the law as it had been

until then. (*Cunningham, supra,* 549 U.S. at pp. 288-293; Stats. 2007, ch. 3, §§ 1-2.) This change cured the determinate sentencing law's *Apprendi* problem.

IV. Parole Revocation Restitution Fine

In its oral pronouncement at the sentencing hearing, the trial court imposed a parole revocation restitution fine of $10,000 under section 1202.45, matching the $10,000 restitution fine the court imposed under section 1202.4, subdivision (b). The abstract of judgment reflects the restitution fine under section 1202.4, subdivision (b), but not the parole revocation restitution fine under section 1202.45.

The parties agree that it was error to impose the section 1202.45 parole revocation restitution fine, as Heliodoro will never be eligible for parole. This is correct. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183-1184.) The parole revocation restitution fine is ordered stricken. The abstract of judgment already correctly shows $10,000 for the restitution fine under section 1202.4, subdivision (b), and no amount for the parole revocation restitution fine under section 1202.45, however, so no change to the abstract is needed.

DISPOSITION

The judgment is modified to strike the parole revocation restitution fine (§ 1202.45), but not the restitution fine (§ 1202.4, subd. (b)), and affirmed as modified. No amendment to the abstract of judgment is necessary.

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SMITH, Acting P.J.

WE CONCUR:

_____
SNAUFFER, J.

_____
DESANTOS, J.